**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| **In the Matter of** | ) | |
| **Petition of AT&T Services, Inc. For Forbearance Under 47 U.S.C. § 160(c) From Enforcement Of Certain Rules For Switched Access Services And Toll Free Database Dip Charges** | ) | WC Docket No. 16-363 |

# REPLY COMMENTS IN SUPPORT OF PETITION OF AT&T SERVICES, INC. FOR FORBEARANCE UNDER 47 U.S.C. § 160(c)


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## GLOSSARY

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| "Carrier Coalition Mot." | Motion for Summary Denial and Opposition to AT&T's Petition of Birch Communications, Inc.; BTC, Inc.; Cbeyond Communications, LLC; Goldfield Access Network, LC; Kansas Fiber Network, LLC; Louisa Communications; Nex-Tech, Inc.; and Peninsula Fiber Network, LLC |
| "CenturyLink Comments" | CenturyLink Opposition/Comments to AT&T Forbearance Petition |
| "Consolidated/West Mot." | Consolidated Communications Companies and West Telecom Services, LLC's Motion of Summary Denial of and Opposition to AT&T's Petition |
| "HD Tandem Opp." | Amended Opposition of HD Tandem |
| "INS Mot." | Iowa Network Services, Inc.'s Motion for Partial Summary Denial of AT&T Services, Inc.'s Forbearance Petition |
| "Inteliquent/Bandwidth/Onvoy Comments" | Comments of Inteliquent, Inc., Bandwidth.com, Inc., and Onvoy, LLC |
| "JVCTC/NVC/GLCC Mot." | James Valley Cooperative Telephone Company, Northern Valley Communications, LLC and Great Lakes Communication Corporation's Joint Motion for Summary Denial and Opposition to Petition of Forbearance of AT&T Services, Inc. for Forbearance Pursuant to 47 U.S.C. § 160(c) |
| "NCTA Comments" | Comments of NCTA – The Internet & Television Association |
| "NRIC Comments" | Comments of the Nebraska Rural Independent Companies |
| "NTCA Comments" | Comments of NTCA—The Rural Broadband Association |
| "O1 Opp." | O1 Communications, Inc.'s Opposition to Petition of AT&T Services, Inc. for Forbearance Under 47 U.S.C. § 160(c) |
| "Omnitel Opp." | Opposition of Omnitel Communications, Inc. |
| "Peerless Opp." | Peerless Network, Inc.'s Opposition to AT&T Services, Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c) |
| "SDN Comments" | Comment of South Dakota Network, LLC |
| "Teliax Opp." | Opposition of the 8YY Origination Competitive Service Providers to the Petition of AT&T Services, Inc. for Forbearance Under 47 U.S.C. § 160(c) |
| "Verizon Comments" | Comments of Verizon |
| "Windstream Comments" | Comments of Windstream Services, LLC on AT&T Petition for Forbearance |
| "WTA/ERTA Opp." | Comments of WTA – Advocates for Rural Broadband and Eastern Rural Telecom Association |

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**REPLY COMMENTS IN SUPPORT OF**
**PETITION OF AT&T SERVICES, INC.**
**FOR FORBEARANCE UNDER 47 U.S.C. § 160(c)**

Pursuant to 47 U.S.C. § 160(c) and 47 C.F.R. § 1.53, and the Commission's Public Notice, 31 FCC Rcd. 11935 (2016), Petitioner AT&T Services, Inc., on behalf of its affiliates ("AT&T"),[1] hereby submits these reply comments in support of its Petition for Forbearance ("Petition") from the Commission's rules for (i) switched access services related to tandem switching and tandem-switched transport services provided on calls to carriers engaged in access stimulation; and (ii) database query charges to long distance carriers for toll-free services.

## I. SUMMARY

Most commenters on AT&T's Petition agree—and none dispute—that there are genuine problems remaining with the Commission's legacy intercarrier compensation ("ICC") regime, which the Commission reformed only partially in 2011. There is also broad consensus that the

[1] AT&T Corp. is the AT&T affiliate that principally provides long distance services and, as such, is the entity that is billed and that pays the charges for the access services discussed in the Petition. AT&T also has affiliates that operate as local exchange carriers that provide and bill for the types of access services discussed in the Petition.

Commission needs to act on its long-pending Notice of Proposed Rulemaking ("NPRM")[2] and put in place a concrete plan to move the access charges not subject to the 2011 transition to a default bill-and-keep regime. And, as AT&T's Petition explained (at 11), the Commission should take such action regardless of whether the Commission grants some or all of the relief requested in AT&T's Petition.

That being said, it is important to keep in mind that the relief sought in AT&T's Petition does not concern any of the broader questions presented by the 2011 NPRM, but rather relates to two discrete issues: (1) tariffed charges for tandem switching and tandem-switched transport services associated with access stimulation schemes, and (2) tariffed charges for 8YY database queries. There are no serious practical impediments to implementation of more immediate reform as to these charges, and, under the forbearance standards Congress enacted in Section 10 (47 U.S.C. § 160), the Commission is compelled to act now. It is simply not an answer to suggest, as many commenters do, that the Commission should wait to address these two issues along with the broader questions of ICC reform.[3] Both types of tariffed charges currently meet the statutory criteria for forbearance, and, as a consequence, there is no need to engage in further rulemaking to forbear from the rules that permit assessment and collection of these charges via tariffs. To the contrary, insofar as the statutory criteria are met, the Commission *must* act. *See* 47 U.S.C. § 160(a).

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[2] Report and Order and Further Notice of Proposed Rulemaking, *In re Connect America Fund*, 26 FCC Rcd 17663, ¶¶ 1297-1334 (2011) ("*Transformation Order*").

[3] *See infra* Part V.A; *AT&T Corp. v. FCC*, 236 F.3d 729 (D.C. Cir. 2001) ("Congress has established § 10 as a viable and independent means of seeking forbearance. The Commission has no authority to sweep it away by mere reference to another, very different, regulatory mechanism.").

## II. INTRODUCTION

***Tariffed Transport and Termination Services Associated with Access Stimulation***. In 2011, the Commission concluded that "prompt Commission action" to "curtail" access stimulation was needed because it was a harmful "scheme" that had many "adverse effects." *Transformation Order* ¶ 662; *see id.* ¶¶ 9, 33, 657, 662-66. Among other things, the Commission determined that, in access stimulation schemes, ratepayers of long distance and wireless services are compelled to pay an enormous implicit subsidy to LECs and to chat and conference companies in connection with these nominally "free services." *Id.* ¶¶ 649, 663-64 (access stimulation schemes "ultimately cost consumers hundreds of millions of dollars annually").

It is also clear that the Commission expected that its 2011 reforms, "over time," "should resolve remaining concerns" about the harms of access stimulation. *Id.* ¶¶ 690, 692. However, nearly five years later, it is evident that access stimulation schemes are still causing serious harm to consumers and the public interest. Indeed, no commenter seriously asserts that access stimulation has been curtailed, or denies that access-stimulating LECs continue to carry billions of minutes of traffic each year. Consequently, ordinary consumers continue to pay implicit subsidies to the various participants in these access stimulation schemes. Although the Commission appeared to believe that reductions in end office access charges would eliminate the incentive to engage in access stimulation, these schemes have been perpetuated by payments for tariffed tandem switching and tandem-switched transport services, as well as by participating CLECs' continued efforts to exploit the Commission's regulatory regime, including the tariffing rules.[4] CLECs (or intermediate providers) are able to extract unreasonable charges for

[4] *E.g.*, Seventh Report and Order, *CLEC Access Charge Reform*, 16 FCC Rcd. 9923, ¶¶ 30-34 (2001) ("*Seventh Report and Order*").

transporting traffic, even in negotiated arrangements, because IXCs have little choice under the Commission's rules other than to transport access stimulation traffic and pay any properly billed and applicable charges, including tariffed tandem-switched transport charges.[5]

In these circumstances, there can be no doubt that the statutory forbearance criteria are satisfied. As explained in the Petition and Part III below, allowing tariffed tandem switching and tandem-switched transport access charges associated with access stimulation traffic is plainly not necessary to ensure just and reasonable rates or to protect consumers. The Commission has already determined that access stimulation schemes lead to unreasonable rates and harm consumers. *Transformation Order*, ¶¶ 657, 662-664. No commenter seriously contends otherwise. Nor does any commenter credibly assert that such charges are consistent with the public interest. Because the Commission's rules perpetuate these schemes by continuing to permit tariffing for tandem switching and tandem-switched transport on access stimulation traffic, the statutory criteria are satisfied and forbearance is required.

Rather than defend the indefensible, AT&T's opponents raise baseless procedural arguments and mischaracterize the scope of AT&T's request for forbearance. As to tariffed tandem switching and tandem-switched transport charges, AT&T's Petition would not have any effect on ordinary long distance traffic, *i.e.*, traffic that is not improperly stimulated. And, while access stimulation remains a serious problem, the number of tandem switches that carry access

[5] *In re Establishing Just & Reasonable Rate*, 22 FCC Rcd. 11629, ¶¶ 1, 5 (2007). Some commenters suggest that IXCs can obtain direct connections from access stimulating CLECs, but, as explained below, that is not accurate in practice. The access stimulating LECs have refused to make available direct trunking arrangements that are benchmarked to the rates offered by the lowest price cap ILECs where these CLECs operate, even though such arrangements are required by law.

stimulation traffic is relatively small.[6] As a consequence, most tandem providers would be largely unaffected by the relief sought in AT&T's Petition, and could continue to charge tariffed rates for tandem switching and tandem-switched transport services on ordinary traffic, until such time as the Commission finishes its rulemaking and completes the transition to bill-and-keep.[7]

Other commenters assert that tandem providers may have difficulty identifying traffic associated with access stimulation schemes. These claims are overstated. For most access stimulation traffic, the identities of the CLECs engaged in such schemes are obvious to industry participants. Indeed, to the extent there is any doubt, the Commission concluded in 2011 that objective traffic data could be employed to help identify carriers engaged in traffic pumping. *Transformation Order* ¶ 700. And, even assuming there were questions at the margins, the Commission should not allow the perfect to be the enemy of the good. The relief sought in AT&T's Petition will help put an end to ratepayer subsidies and the other public interest harms associated with access stimulation; yet many commenters advocate allowing these harms to continue indefinitely until overall ICC reform is completed. That response puts the interests of access-stimulating carriers over those of consumers. Indefinite delay of the relief sought by

[6] Further, AT&T's Petition encompasses only the tariffing of tandem switching and tandem-switched transport services when the LEC engaged in access stimulation subtends the tandem switch. For example, as to access stimulation schemes involving terminating access, access providers would still be able to tariff and bill access charges on the originating end of the call, so long as those charges are otherwise consistent with the Commission's transition and other rules for access services. As to access stimulation schemes involving originating access, access providers would still be able to bill any otherwise permissible access charges on the terminating end of such calls.

[7] Nor would AT&T's Petition unfairly harm providers of centralized equal access ("CEA") service in the states where such arrangements exist. AT&T's Petition would have no effect on traditional traffic carried over CEA arrangements. Although some CEA providers, such as Iowa Network Services ("INS"), have reaped significant benefits from access stimulation, CEA service was never intended as a vehicle to facilitate the pumping of large volumes of adult chat and conferencing calls to rural areas at high rates; instead, CEA arrangements were intended to result in lower transport charges for ordinary long distance calls, yet some carriers are using them to perpetuate high transport charges.

AT&T is also inconsistent with the Commission's conclusions in 2011 that the "continuation of transport charges in perpetuity would be problematic," and would "lead to anticompetitive behavior or regulatory arbitrage such as access stimulation." *Transformation Order* ¶ 820.

***8YY Database Queries.*** The commenters do not deny that there is no rational economic explanation for the wide disparities in tariffed 8YY database query charges. Nor do they deny that, when such tariffing was first permitted over 25 years ago, the Commission found that the costs of such queries would be "relatively modest" and questioned whether a recurring charge was even necessary. *800 Report and Order*, 4 FCC Rcd. 2824, ¶ 73 & n.147 (1989). And, as individual Commissioners have noted, the Commission's rules on 8YY services have not kept up with "marketplace realities," which have changed dramatically. *See* AT&T Pet. at 23.

Nevertheless, some commenters not only insist that the tariffing of 8YY database charges is necessary to ensure that LECs can recover all of their costs from IXCs, but that the Commission already considered and rejected adopting bill and keep for 8YY database queries and other rate elements not subject to the transition. As discussed in Part IV below, neither claim is true. In 2011, the Commission determined that the "ultimate end state" for *all traffic* is bill-and-keep. *Transformation Order* ¶¶ 34, 736 (emphasis added). That conclusion (which was upheld by the Court of Appeals) unquestionably represents the Commission's policy and is the law. Consequently, there is no doubt that LECs ultimately will not be able to recover the costs associated with 8YY database queries from IXCs via tariffed access charges assessed to IXCs. The only relevant question is one of timing.[8]

[8] *Transformation Order* ¶ 817 ("The legal framework underpinning our decision today [to adopt bill-and-keep as a default mechanism] is *inconsistent with the permanent retention of originating access charges*.") (emphasis added).

Although there may be legitimate questions about the timing for the sunset of other originating rate elements, there are no such issues concerning 8YY database queries. Nor is there any merit to the claims of some commenters that the relief sought in the Petition would lead to consumers unfairly subsidizing the costs of toll-free calls. 8YY customers will continue to pay for the use of 8YY numbers and the long distance services needed to complete the calls. Moreover, the view espoused by some commenters that originating callers should pay nothing in connection with an 8YY call is inconsistent with the Commission's recognition in 2011 that "both parties generally benefit from participating in a call" and that cost-sharing is therefore appropriate. *Transformation Order* ¶ 744.

In sum, the plea by some commenters for the continuation of tariffed 8YY query charges is simply anachronistic. Costs for other types of database queries are not ordinarily recovered via tariffed charges on IXCs. Nor are other carriers, notably wireless carriers, entitled to tariff and charge IXCs when their customers place toll-free calls. Consequently, the anomaly is not forbearance but rather the continued tariffing of 8YY database query charges.

***Procedural Claims.*** The commenters also raise a host of procedural objections to the relief in the Petition, even though it is mandated by Congress in the forbearance statute. As explained below in Part V, these procedural claims all lack merit. The Commission cannot deny AT&T's Petition on the grounds that it intends, at some unspecified point in the future, to finish its broader reform of intercarrier compensation and address the requested relief using a separate rulemaking mechanism. Nor is there any merit to the claim that the existence of other remedial mechanisms (such as a Section 208 complaint, or a tariff review process) somehow excuses the Commission from addressing the merits of AT&T's Petition. Likewise defective is the claim that AT&T lacks "standing" to seek the forbearance relief requested in the Petition. AT&T's

LEC affiliates are subject to the rules for which forbearance is being sought; in any event, the Commission has never applied a strict standing requirement like those proposed by some commenters.

A few commenters have filed motions for summary denial of AT&T's Petition, but these motions misread AT&T's Petition, which both properly identified the rules and carriers subject to the proposed forbearance, and provided the data and evidence necessary for the Commission to conclude that the statutory criteria have been met. Finally, there is absolutely no merit to the claims of some commenters that the Commission should "condition" forbearance on allowing LECs to recover intercarrier compensation via state common law claims. Such a result is flatly inconsistent with the Commission's 2011 bill-and-keep regime, which is "uniform and national" in scope, with a specified role for states to play. Just as states clearly cannot authorize recovery of end office charges that have been reduced, it would be improper to allow LECs to rely on state law to circumvent federal law by allowing them to recover intercarrier compensation charges for the services at issue in AT&T's Petition.

## III. THE COMMENTS FAIL TO REBUT AT&T's SHOWING THAT FORBEARANCE IS REQUIRED AS TO TARIFFED CHARGES FOR TANDEM SWITCHING AND TANDEM-SWITCHED TRANSPORT ACCESS SERVICES ON CALLS TO OR FROM LECs ENGAGED IN ACCESS STIMULATION.

Contrary to the claims asserted by a number of the commenters, AT&T clearly has met its burden of proof in support of its Petition as it relates to tandem switching and tandem-switched transport on traffic to LECs engaged in access stimulation. Under the statutory criteria in Section 10, the tariffed charges for which AT&T has requested forbearance clearly are not necessary to ensure just and reasonable rates or to protect consumers (47 U.S.C. § 160(a))—to the contrary, the Commission has determined that access stimulation leads to unreasonable rates and harms consumers. *Transformation Order* ¶¶ 649, 657, 663-64, 666. Forbearance is also in

the public interest because, although the Commission believed its 2011 reforms would "curtail" the "adverse effects" of access stimulation, the practice remains prevalent, and the forbearance AT&T has requested is necessary to address the remaining harms from access stimulation. Commenters raise several arguments as to why forbearance is improper, but none has merit.

### A. No Commenters Seriously Dispute That Access Stimulation Has Flourished, Despite the Commission's Efforts to Curtail that Practice.

#### 1. Access Stimulating LECs Continue to Exploit The Commission's Tariffing Rules For Tandem Switching And Tandem-Switched Transport.

In 2011, the Commission expressly found access stimulation was "wasteful" and "harmful," and took steps to "curtail" that practice by capping the rates that access-stimulating CLECs could charge. *Transformation Order*, ¶¶ 33, 649. Notwithstanding those efforts, however, access stimulation has continued to flourish. Indeed, it is noteworthy that among all of the commenters, virtually no party has suggested—let alone presented any evidence to show—that this practice has in fact been curtailed.[9] The continued success of this practice is no longer primarily due to the sharing of revenues derived from end-office switching; under the Commission's regulations, those revenues have declined significantly and will effectively disappear in the near term.

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[9] Only WTA claims there is "no *specific* evidence that 'access stimulation' remains a significant problem." WTA at 1-2 (emphasis added). Yet, the commenting parties that are directly affected by access stimulation disagree. In fact, AT&T, Verizon, and CenturyLink are each being billed hundreds of millions of minutes of access stimulation traffic, which is contrary to the Commission's view that the practice should have been curtailed. Pet. at 9; Verizon at 3 ("[T]raffic pumpers are stimulating hundreds of millions of minutes each month to Iowa and South Dakota"); CenturyLink at 2 ("access charges related to access stimulation continues to be a problem").

Omnitel is the only commenter asserting that the free calling services associated with access stimulation serve the public interest because users have "relied upon" those services. Omnitel at 9. However, Omnitel ignores that the Commission has already determined that reliance on these nominally "free" services harms the consumers that subsidize the costs and the conference providers that compete against "free" conference companies. *Transformation Order* ¶¶ 662-66.

Rather, the continued success of access stimulation has been fueled primarily by LECs that depend upon unreasonable charges for tandem switching and tandem-switched transport to fund access stimulation. These unreasonable charges for tandem switching and tandem-switched transport arise due to the following factors.

*First*, CLECs involved in access stimulation have refused to offer a tariffed option pursuant to which IXCs can directly connect to the CLEC's end office switch, and thereby avoid the high per-minute and/or per-minute, per-mile charges associated with tandem switching and tandem-switched transport.[10] The large price cap ILECs, against which access stimulating CLECs are required to benchmark their rates (*see* 47 C.F.R. § 61.22(g)), generally offer at least two options to IXCs for routing traffic: (1) tandem-switched transport, which typically includes per-minute, per-mile charges and which is routed via a tandem switch; and (2) direct-trunked transport, which bypasses a tandem switch to connect directly to an end office switch, and which is generally priced at a flat per month rate.[11] As explained below, because access stimulating CLECs have very high traffic volumes, direct-trunked transport would be a far cheaper and more efficient way to carry traffic to or from access stimulating LECs. Yet, generally access

[10] Indeed, one carrier participating in this proceeding (Great Lakes) went so far as to eliminate its direct connection offering after the Commission issued the *Transformation Order*. *See* Great Lakes Communication Corp., Tariff F.C.C. No. 1, Orig. Pages 2-60, 6-1, 6-3 (original tariff that offered both tandem-switched transport and flat-rated direct trunked transport); *see also* Compl. ¶ 40, *AT&T Corp. v. Great Lakes Communications Corp.*, Docket No. 16-170, File No. EB-16-MD-001 (Aug. 16, 2016).

Some commenters all but admit that, if direct connections are not available, then tariffed tandem-switched transport charges are harmful. *See* Consolidated/West Mot. at 26 & n.89 (arguing that "there is no need" for forbearance "because AT&T can obtain direct trunks" which create "downward pressure on tariffed rates"); Carrier Coalition at 25 & n.106 (same). Although they assert that such direct connections are available, they provide no evidence to support that claim.

[11] *See, e.g.*, CenturyLink Operating Companies Tariff F.C.C. No. 11, 1st Rev. Page 6-225 ("[F]or each [Direct-Trunked Transport] facility provided, . . . a fixed monthly rate, per mile band, and monthly rate per mile is assessed.").

stimulating CLECs have been unwilling to offer the service via tariff, at the rates that such service is offered by the lowest price cap LEC in the states in which those CLECs operate.

*Second*, because the Commission's rules allow tariffing of tandem switching and tandem-switched transport charges on access stimulation traffic, LECs have been able to continue to engage in access stimulation, and thereby force IXCs and their customers to pay an implicit subsidy via the tariffed access charges.[12] Under the Commission's regulatory regime, IXCs are obligated to complete the calls, and pay the properly tariffed and applicable charges. *In re Establishing Just & Reasonable Rate*, 22 FCC Rcd. 11629, ¶¶ 1, 5 (2007).[13] Further, IXCs cannot pass these excessive charges on to the customers that cause them. *Seventh Report and Order*, ¶¶ 30-33. To make matters worse, in a number of cases, the mileage associated with such transport is itself inflated. Here again, no commenter has presented any evidence to dispute these facts, and several acknowledge that mileage pumping is a current, recurring and persistent problem.[14]

*Third*, because access stimulating LECs know that IXCs have no choice but to complete the calls and pay the properly tariffed and applicable transport charges, they have been able to extract unreasonable charges via negotiated agreements. Given the high call volumes involved

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[12] *See* CenturyLink Comments at 3-4 (agreeing that tariffed charges for tandem switching and tandem-switched transport create "arbitrage problems currently plaguing the industry"); Verizon at 1 (noting that "traffic pumping remains a problem" because "tandem switching and transport . . . are not yet transitioning to bill-and-keep").

[13] As noted in the Petition, in several cases, carriers have improperly billed tandem switching and/or tandem-switched transport charges (as well as CEA service), and AT&T has disputed and challenged those charges.

[14] CenturyLink Comments at 3-4; Verizon Comments at 1; Inteliquent/Bandwidth/Onvoy Comments at 2 ("The Commission should use this forbearance proceeding to put an end to [the] arbitrage practice [of billing excessive transport mileage]."); Peerless Opp. at 13 ("Peerless does not take issue with AT&T's concerns over mileage pumping."); NCTA Comments at 3 ("[A]ccess stimulation remains problematic, imposing undue costs on consumers and ultimately harming competition.").

with access stimulation traffic, there is no legitimate question that direct trunked transport, or some other direct trunking arrangement, is generally a more efficient way to transport such traffic, as compared to tandem-switched transport.[15] Consequently, IXCs would undoubtedly seek a direct connection to deliver access stimulation traffic to the CLEC's end office switch, if such connections were available in practice. Indeed, INS all but admits this, acknowledging that, if given a choice, IXCs would ask for direct trunks to transport access stimulation traffic.[16]

But as noted above, access stimulating CLECs have generally not offered direct trunking in their tariffs. Moreover, when IXCs have asked such CLECs to provide such direct trunking arrangements via contract (or to allow the IXCs to obtain direct connections from a third party), virtually all access stimulating CLECs have either refused outright, or agreed to do so only if the IXC is willing to pay a significant premium above the price of direct trunked transport tariffed by the lowest-priced price cap LEC.[17] Because IXCs are required by the Commission's rules to complete access stimulation calls, IXCs face a Hobson's choice: either pay the properly tariffed and applicable tariffed tandem-switched transport rates, or pay a unreasonable premium for a

[15] While the exact costs of a given direct-trunked transport service can vary based on a number of factors, including the up-front costs incurred in establishing direct connections or fluctuations in traffic volumes from month to month, it is certain that, for transporting access-stimulation traffic, a flat-rated service is far less expensive and less subject to abuse than a service priced on a per-minute and/or per-minute, per-mile basis. *See, e.g.*, Answer & Counterclaims, ¶¶ 101-03, *Iowa Network Servs., Inc. v. AT&T Corp.*, No. 14-3439 (D.N.J. Aug. 4, 2014) ("AT&T Answer") (estimating that direct connection would cost AT&T one-tenth of the tandem rate).

[16] *See* INS Comments at ii (noting that "direct trunk bypass" would allow AT&T to avoid paying "a higher CEA rate").

[17] If IXCs were able to choose how to transport the traffic, such premiums would not be sustainable. *See Seventh Report and Order* ¶ 37 ("it is highly unusual for a competitor to enter a market at a price dramatically above the price charged by the incumbent").

direct connection.[18] In both cases, the access stimulating CLEC is exploiting the Commission's tariffing rules and regulatory regime to extract unreasonable charges on access stimulation traffic. Forbearance would reduce these unreasonable charges on ratepayers.

### 2. It Is Against the Public Interest for Ratepayers to Subsidize Inefficient, Excessively Priced Transport on Access Stimulation Traffic.

Because the Commission's rules continue to permit tariffed charges for tandem switching and tandem-switched transport, access stimulation schemes have not been curtailed, but have continued to flourish. Consumers thus continue to pay an enormous subsidy, via long distance charges, to cover the rates that CLECs and intermediate providers are tariffing and charging for the tandem switching and tandem-switched transport services assessed in connection with access stimulation traffic.

Some commenters advocate requiring the use of direct connections, rather than forbearance. *E.g.*, CenturyLink Comments at 2. However, as explained above, it is often the case that access stimulating CLECs (or third parties) are willing to provide a direct connection only if IXCs pay a price premium, with charges often well in excess of the tariffed rates of the lowest-priced, price cap ILECs. Vigorous enforcement of the requirement that access stimulating CLECs tariff a direct connection option (using the appropriate price cap ILEC rates) would undoubtedly reduce in part the subsidies that ordinary long distance and wireless consumers pay. However, the real root of the problem is the continued ability of CLECs engaged in traffic stimulation (or intermediate carriers) to tariff tandem switching and tandem-switched transport charges. Because these tariffed charges allow access stimulation schemes to

[18] Third parties (including least cost routers or CEA providers) might also be willing to carry the access stimulation traffic, but even if that is nominally available, these entities know that the tariffed tandem-switched transport rates form a price umbrella, and any third party rates to carry the traffic invariably contain a price premium.

be perpetuated, and lead to unreasonable charges for transport, rules that permit the tariffing of tandem switching and tandem-switched transport on access stimulation traffic harm the public interest and should be subject to forbearance.

### B. AT&T's Petition Will Not Affect LECs and CEA Providers That Provide Tandem Switching and Tandem-Switched Transport For Legitimate Traffic.

#### 1. The Forbearance Sought Is Expressly Limited To Access-Stimulated Traffic.

A number of commenters incorrectly assert that AT&T's proposal is overbroad, and would effectively detariff tandem switching and tandem-switched transport rates for all traffic. That is not true. The forbearance sought with regard to tandem switching and tandem-switched transport plainly is limited to access stimulation traffic. There is likewise no merit to the claim that forbearance would provide an advantage to AT&T over other IXCs in the provision of ordinary long distance service. As AT&T's Petition is limited to access-stimulation traffic, it does not affect ordinary long distance service, including long distance calls routed by tandem providers on behalf of AT&T to carriers not engaged in access stimulation.

#### 2. The Forbearance Sought Is Consistent With the Commission's Rules and Orders Concerning CEA Service.

Contrary to INS's claims, forbearance would not undermine the Commission's rules and orders regarding CEA service. INS at 1-19. Indeed, the decisions on which INS relies in its comments make clear that CEA service was intended to facilitate "equal access" for the customers of small, rural ILECs that lacked sufficient traffic to justify providing equal access on anything other than a centralized basis; its principal focus was on originating traffic. Access-stimulation traffic, by contrast, does not remotely resemble traditional CEA traffic: traffic volumes in access stimulation schemes are not small but massive, and predominantly consist of terminating traffic to which equal access does not apply.

Further, the Commission has never authorized CEA providers to provide CEA service to CLECs engaged in access stimulation, nor did it authorize CEA providers to use the revenues derived from CEA service to subsidize other services or to advance any other rural service initiatives besides the facilitation of equal access service.[19] There is thus no merit to the claim that CEA providers have no way of recouping the costs of CEA service if forbearance is granted; they would continue to be able to tariff tandem switching and tandem-switched transport service (subject to the caps established in the *Transformation Order* and other rules for access) on calls to LECs that are not engaged in access stimulation.

Finally, INS's claim (at 10, 18) that it has not benefitted from access stimulation is flatly inaccurate. As is clear from INS's own rate filings, its involvement in access stimulation has been extensive, and has resulted in an explosion of the minutes of use handled by INS. In 2002, before access stimulation became widely prevalent in Iowa, INS reported handling about 771 *million* minutes per year; by 2011, INS was reporting that it handled nearly 3.9 *billion* minutes per year—and all or virtually all of the increase was due to access stimulation.[20] Indeed,

[19] INS and other commenters claim that, in states where CEA arrangements were permitted to help small carriers with low traffic volumes, there is a "mandatory use" requirement that prohibits bypass of the CEA provider and compels the IXC to send the extraordinary traffic volumes associated with access stimulating CLECs via the CEA provider. This is nonsense. Just as the Commission never authorized CEA service for use on access stimulating traffic, the Commission never has compelled IXCs to transport traffic to CLECs via CEA providers. The decisions relied on by INS predate *the very existence* of CLECs. Moreover, as a factual matter, it is evident that bypass, at premium prices, is common. Finally, if INS were correct, then even ordinary, non-access stimulation CLECs operating in Iowa would be compelled to interconnect via INS. In fact, CLECs in Iowa have always commonly interconnected via CenturyLink, thus disproving any mandatory use requirement for CLECs of any kind.

[20] *See* INS, 2004 Annual Access Charge Filing, Transmittal No. 22, Descrip. & Justification, section 1 (reporting 2002 traffic); INS, 2013 Annual Access Charge Filing, Transmittal No. 30, Descrip. & Justification, section 1 ("2013 INS Filing") (reporting 2011 traffic). In filings prior to 2013, INS attributed the additional traffic to "a significant increase in toll aggregator traffic." INS, 2006 Annual Access Charge Tariff Filing, Transmittal No. 25, Descrip. & Justification, section 1 ("2006 INS Filing").

AT&T's data indicate that about *90 percent* of the traffic that it sends to INS is associated with access stimulation LECs. Further, INS's own rate filings show that INS's involvement in access stimulation has led to a sizeable increase in revenues, and for some years INS has reported a rate of return that exceeded, by a wide margin, the Commission's authorized rate of return.[21] The evidence also shows that INS used these additional revenues to build-out its fiber network, which it uses for numerous other services. Indeed, it is quite clear from INS's Opposition that the revenues derived from access stimulation traffic have been subsidizing INS's other services for years. The Commission has already rejected the view that access stimulation furthers the public interest, if the resulting revenues were used to support broadband investment. *Transformation Order* ¶ 666.

### C. Forbearance Would Not Result in AT&T Obtaining "Free" Service, But Rather Would Prevent Ratepayers From Subsidizing "Free" Services Used By A Subset of Users.

In its Petition, AT&T seeks only to detariff rates for tandem switching and tandem-switched transport services for access stimulation traffic. Until there are further reforms, AT&T has no objection to continuing to permit the tariffing of a direct connection service (even for access stimulation) that is benchmarked to the rate of the lowest price cap LEC and is applicable to all providers of transport services involving access stimulation traffic. Such an approach is consistent with the Commission's regulations, but, as explained above, such services are not

[21] *See* 2006 INS Filing (reporting return on investment in 2005 of 27.89 percent); 2013 INS Filing (reporting return on investment in 2012 of 64.57 percent). Despite its involvement in access stimulation schemes, INS's tariffed rate has not declined and has remained quite high, at about 0.9 cents per minute. *See* Verizon at 3. Given the Commission's conclusion that "significant increases" in switched access traffic, along with unchanged access rates, "results in a jump in revenues and thus inflated profits that almost uniformly" make a LEC's tariffed rates unreasonable, *Transformation Order* ¶ 657, it is highly likely that INS's rates and rates-of-return have been unreasonable for some time. Although INS has at times reported negative rates of returns, these supposed returns appear to have been derived through various accounting gimmicks and cross-subsidies.

currently being offered in the tariffs of CLECs engaged in access stimulation.[22]

There is also no merit to the claim made by James Valley/NVC/Great Lakes (at 9) that forbearance would confer a bargaining advantage on IXCs that would enable to them to obtain "free" service. As the Commission found in the *Seventh Report and Order*, ¶ 85, IXCs lack monopsony purchasing power for access services. Thus, the effect the requested forbearance would have on negotiations would be to eliminate the ability of access-stimulating CLECs to exploit the Commission's rules on CLEC access services, and to eliminate the pricing umbrella created by the rates currently offered by tandem providers.[23] Forbearance is thus entirely consistent with the *Seventh Report and Order*, by which the Commission sought to limit CLECs' ability to exploit the Commission's tariffing rules. *See Seventh Report and Order* ¶¶ 2, 4, 11, 30-34.[24]

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[22] Consolidated Communications and West Telecom ask the Commission to "clarify" that non-payment of tariffed charges would violate the Act. Consolidated/West Mot. at 39-40. Their request flies in the face of the Commission's "long-standing" precedent—one "repeatedly held" for over "twenty years," and "acknowledged and followed by courts"—that "collection actions fail to state a claim for violation of the Act." *All Am. Tel. Co. v. AT&T Corp.*, 26 FCC Rcd. 723, ¶ 10 (2011) (internal quotation marks omitted).

[23] INS claims that forbearance would lead to the dumping of traffic on other providers' terminating networks. *See* INS Opp. at 19. However, the Commission has rejected the argument that bill-and-keep arrangements would encourage such dumping, and INS offers no evidence to the contrary. *See Transformation Order* ¶ 754 (noting that (i) "no commenter has identified a concrete reason why any carrier would engage in such 'dumping' or how it would do so," and (ii) there was "no evidence that any such 'dumping' has occurred in the wireless industry, which has operated under a similar framework.").

[24] INS and Teliax claim that AT&T, when acting as a wholesale long distance provider, passes through the access expense to other third party carriers via negotiated contracts. INS Mot. at 18-19; Teliax Opp. at 8-9. As an initial matter, no carrier is ever compelled to purchase long distance termination service from AT&T on a wholesale basis. In any event, the point is irrelevant. The public interest harm is the same regardless of any wholesale arrangements—either AT&T's own retail customers or the customers of third party IXCs/wireless companies are compelled to pay implicit subsidies that fund access stimulation schemes.

### D. Intermediate Providers Are Able to Identify the Access-Stimulation Traffic at Issue.

There is no merit to the claim that intermediate transport providers cannot identify access stimulation traffic.[25] To begin with, very few intermediate carriers that offer tandem switching and tandem-switched transport services pursuant to tariff would have to identify such traffic upon forbearance.[26] Although access stimulation remains a significant problem, it is a concentrated one, driven by providers that operate in a few limited areas. Because most tandem switches are not connected to any LECs engaged in access stimulation, the number of intermediate providers affected would thus be small.

Conversely, the identities of most access-stimulating LECs are well-known in the industry. The access stimulating LECs that carry the most traffic operate openly as such, and several—such as Great Lakes, Northern Valley, and Omnitel—are participating in this proceeding. But even if LECs were to try to disguise or deny their access stimulation schemes, it is and would remain obvious to any intermediate carrier that delivers billions of minutes of calls to locations such as Spencer, Iowa, and Redfield, South Dakota, that those minutes were the product of access stimulation arrangements.

It is also noteworthy that none of the commenters claiming that intermediate providers cannot identify access-stimulation traffic provides any evidence to dispute the Commission's conclusion that its *Transformation Order* provides sufficient "guidance . . . to determine whether

[25] *See* INS at 13; Peerless at 3; NTCA at 15-16; Inteliquent/Bandwidth/Onvoy at 6; WTA/ERTA at 6. INS's claimed naiveté (*see* Opp. at 13) is belied by its own rate filings in which it reported the actual and projected "terminating conference call minutes handled by call aggregators." 2006 INS Filing; *see also* Iowa Network Servs., Inc., 2008 Annual Access Charge Tariff Filing, Description and Justification, at 2 n.1 ("The term call aggregator refers to businesses that generate high-volume traffic . . . .").

[26] And even the few that would be affected would not necessarily have to make such a determination. For example, if access stimulating CLECs offered direct trunking at the rates required by the Commission's rules, the IXC would make that determination.

the definition [of access stimulation] is met without further Commission intervention." *Transformation Order* ¶ 699. In that order, the Commission established a rebuttable presumption that a carrier is engaged in access stimulation when it has a terminating-to-originating traffic ratio of at least 3-to-1 in a calendar month, or has had more than 100 percent growth in originating or terminating switched access minutes of use when compared to the same month in the prior year. *Id.* ¶¶ 675, 699. It has been AT&T's experience that carriers engaged in access stimulation often easily exceed the Commission's threshold ratio and/or the percentage growth threshold.[27]

### E. It Is Imperative That The Requested Forbearance Apply to Intermediate Providers That Transport Access Stimulation Traffic

A number of commenters oppose AT&T's requested forbearance on the grounds that it is overbroad and that it should not apply to intermediate providers that are not directly involved in access stimulation, *i.e.*, providers that do not have revenue sharing agreements with providers of free conferencing and chat services.[28] However, the fact that some intermediate providers may not be parties to revenue sharing agreements[29] does not mean that they do not benefit from access stimulation by way of increased traffic, nor does it mean that they do not contribute to the continued growth of access stimulation.

To the contrary, because the Commission intended access stimulation to be curtailed, it is imperative that forbearance with respect to the tariffing of tandem switching and tandem-

[27] *See, e.g.*, AT&T Answer ¶ 87 (noting that INS's terminating volumes were more than 30 times its originating volumes in recent bills to AT&T).

[28] *See, e.g.*, Inteliquent/Bandwidth/Onvoy Comments at 4-6; O1 Opp. at 7-8; NTCA Comments at 14.

[29] At least one of the intermediate providers that opposes AT&T's Petition appears to be owned by one of the major providers of free conferencing services. *See* HD Tandem Pet. at 6. HD Tandem's comments are signed by the current CEO of Free Conferencing Corp, which is one of the largest, if not the largest, of the free conferencing providers engaged in access stimulation.

switched transport be applied not only to access stimulating CLECs but also to the intermediate providers that transport access stimulation traffic to the end offices of such CLECs.[30] The tandem switching and tandem-switched transport services provided by intermediate providers are essential to the delivery of access stimulation traffic; without such transport, the calls in many cases could not be completed. Moreover, if forbearance is not applied to all tandem switching and tandem-switched transport, the result would allow the intermediate providers to extract an even greater share of the premium charged on access stimulation traffic. Further, rather than provide the tandem-switched transport themselves, access stimulating CLECs would simply agree to permit the intermediate provider to interconnect with their end offices in exchange for a portion of the revenue derived from the transport service provided by the intermediate provider.[31] The end result would be that access stimulation would not be curtailed, and IXCs and their customers would continue to pay inflated rates and implicit subsidies in connection with access stimulation traffic.

That this market dynamic is present is driven home by the comments of Inteliquent, which is a large intermediate provider. Inteliquent acknowledges the problems associated with access stimulation and urges the Commission to take action against access stimulating CLECs by limiting their ability to charge for transport to a single mile.[32] But it opposes any restriction on its own ability to charge for tandem switching and tandem-switched transport. This proposal is no solution at all. Ordinary long distance and wireless customers would not benefit. Rather,

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[30] *See* NCTA Comments at 4 (implying support for forbearance, where request limited to "access stimulating LECs *and their tandem providers*") (emphasis added).

[31] As is clear from the comments, access stimulating CLECs are well aware of their ability to control the means of access to their networks and thereby extract added benefits. *See* JVCTC/NVC/GLCC Mot. at 10; HD Tandem Opp. at 5.

[32] Inteliquent/Bandwidth/Onvoy Comments at 2, 5-6.

those customers would simply pay a subsidy to Inteliquent and other intermediate providers, because intermediate providers would be able to get a better deal in their negotiations with access stimulating CLECs, as described above.

## IV. FORBEARANCE FROM DATABASE QUERIES IS ALSO REQUIRED UNDER SECTION 10(a).

In its Petition, AT&T fully explained the basis for its request that the Commission forbear from its rules that permit LECs to tariff and assess per query database dip charges on toll free calls.[33] As AT&T noted, the Commission initially believed that the "costs associated specifically with 800 data base access will be relatively modest,"[34] and thus permitted ILECs to tariff a separate database dip charge, priced on a per query basis.[35] Today, however, the record reflects that the charges for database queries tariffed by LECs vary substantially, and, as a result, captive IXCs and their customers are paying LECs an implicit subsidy.[36] This is the type of inefficiency and arbitrage opportunity that has caused members of the Commission to conclude that, as to "regulation of toll-free services, 'there is still more to be done,' and that it is 'past time to reexamine' the Commission's pre-1996 decisions about toll-free services."[37]

Here, forbearance from rules allowing LECs to tariff charges billed to IXCs for toll-free database requests is appropriate because (i) the rules allowing such tariffing are not necessary to ensure that the charges for toll-free services are just and reasonable, or to protect consumers,[38]

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[33] AT&T Petition at 18-23.

[34] *See* Report and Order, *In the Matter of Provision of Access for 800 Service,* 4 FCC Red. 2824, ¶ 73 (1989) ("*800 Report and Order*").

[35] AT&T Petition at 18.

[36] *Id.* at 19.

[37] *E.g.*, *id.* at 23 (quoting 28 FCC Rcd. at 15350) (Statement of Commissioner Pai); *see also id.* (citing statement of Commissioner Clyburn).

[38] AT&T Petition at 20-22 (applying 47 U.S.C. § 160(a) (1) & (2)).

and (ii) forbearance is "consistent with the public interest,"[39] Opposing commenters contend that the Commission should reject forbearance, but their arguments are without merit.

### A. The Rules Allowing LECs To Tariff Charges Billed To IXCs For Toll-Free Database Queries Are Not Necessary To Ensure That Charges For Toll-Free Calls Are Just and Reasonable.

Forbearance is necessary here because, as explained by Verizon, "[t]here are few, if any limits on . . . 8YY query charges." Verizon Comments at 6. As to ILECs, "8YY query charges . . . [are] constrained only by the price-cap and rate-of-return regimes," and, as to CLECs, they "have no constraints except for sections 201 and 202's general prohibitions against unjust and unreasonable charges and practices." *Id.* Not surprisingly, "tariffed 8YY query charges—and particularly CLEC 8YY query charges—oftentimes are very high, sometimes $0.015 or more per query,"[40] and "toll-free service providers have no choice but to accept those charges."[41]

A number of commenters opposing AT&T's Petition claim that not allowing LECs to tariff recovery of these charges from IXCs would itself result in unreasonable rates and charges.[42] This argument, however, is effectively a collateral attack on the Commission's determination that all traffic ultimately will be subject to bill and keep. In making this determination, the Commission explained that a bill-and-keep methodology "brings market discipline to intercarrier compensation because it ensures that the customer who chooses a

[39] *Id.* at 22-23 (applying 47 U.S.C. § 160(a)(3)); *see* Verizon Comments at 7 ("AT&T's petition offers a reasonable way for the Commission to eliminate tariffed 8YY query charges and discourage the associated arbitrage opportunities these subsidies are generating").

[40] Verizon Comments at 6 (citing DoveTel Comm's, LLC d/b/a Sunc Global, FCC Tariff No. 1, § 7.4; Harbor Comm's LLC, FCC Tariff No. 2, § 5.4.5).

[41] Verizon Comments at 6; *see* CenturyLink Comments at 6 ("AT&T has a valid point that database query charges vary considerably within the industry" and such charges "creat[e] arbitrage issues").

[42] O1 Opp. at 22 ("If AT&T's Petition were granted on this issue, this [database query] cost would go un-recovered"); Consolidated/West Mot. at 35 (forbearance would result in "extremely difficult" negotiation of agreements with IXCs).

network pays the network for the services the subscriber receives."[43] In contrast, "[u]nder the existing approach, carriers recover the cost of their network from competing carriers through intercarrier charges, which may not be subject to competitive discipline."[44] As a result, AT&T's request for forbearance implements the appropriate market structure by "giv[ing] carriers appropriate incentives to serve their customers efficiently."[45]

Objecting commenters ignore that forbearance will not "limit the amount of a carrier's cost recovery, but instead will alter the source of the cost recovery – network costs would be recovered from carriers' customers supplemented as necessary by explicit universal service support, rather than from other carriers."[46] Under this system, "'carriers should be free to negotiate commercial agreements that depart from the default regime.'"[47] Contrary to the claims of commenters O1 Communications (at 26) and Consolidated (at 34-35), there is no basis for concluding that the negotiation process to reach private contracts for database query services would be ineffective for carriers that provide efficient database query services at appropriate rates.[48]

In a related vein, commenters ignore these facts when they suggest that detariffing would result "in a regime in which LECs would be obligated to incur costs but without concomitant

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[43] *Transformation Order*, ¶ 742.

[44] *Id.* ¶ 742.

[45] *Id.* ¶ 742. AT&T decidedly is not seeking "reconsideration" of the Commission's *Transformation Order*. Omnitel Opp. at 4. Although the Commission "previously refused to regulate CLEC databased [sic] dip rates," O1 Opp. at 21, the *Transformation Order* subsequently makes clear that "a bill-and-keep methodology" would be "the end state for all traffic." *Transformation Order*, ¶ 740.

[46] *Id.* ¶ 775.

[47] *Id.* ¶ 775 n.1290.

[48] Indeed, O1 Communications acknowledges that its claim against AT&T Mobility was rejected and dismissed by the California Public Utilities Commission. *See* O1 Opp. at 26.

cost recovery mechanism," thereby "implicating concerns relating to a Constitutional violation of 'takings,' as prohibited by the 5th Amendment of the United States Constitution."[49] As explained by the Commission, forbearance from the tariff filing requirement (as with a bill-and-keep system), does not result in "free" database queries; rather, it "merely shifts responsibility for recovery from other carrier's customers to the customers that choose to purchase service from that network plus universal service support where necessary."[50] Likewise, there has been no showing that forbearance would deny carriers the ability "to operate successfully, to maintain [their] financial integrity, to attract capital, [or] to compensate its investors for the risks assumed.'"[51] As such, forbearance does not implicate the Takings Clause.

### B. The Rules Allowing LECs To Tariff Charges Billed To IXCs For Toll-Free Database Queries Likewise Are Not Necessary To Protect Consumers.

There also is no merit to the claim that consumers would be harmed by de-tariffing of 8YY database queries. To the contrary, as the Commission already has explained, and as discussed above, forbearance here would give "carriers appropriate incentives to serve their customers efficiently."[52] Specifically, absent a tariff-filing mechanism for recovery of database queries, originating LECs would be required by market forces to engage in innovative efforts to reduce costs and operate more efficiently, thus benefitting consumers through "reduced charges and/or improved service quality."[53]

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[49] *See* NTCA Comments at 19; *see also* U.S. Const. amend. V ("[N]or shall private property be taken for public use, without just compensation").

[50] *Id.*

[51] *Transformation Order* ¶ 925 (quoting *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 605 (1944)).

[52] *Transformation Order* ¶ 742.

[53] *Id.* ¶ 748.

Nor would forbearance force consumers to subsidize 8YY services.[54] To the contrary, 8YY customers would continue to bear the costs associated with, for example, obtaining and managing 8YY numbers, originating access costs not subject to transition, the long distance service needed to receive 8YY calls and the costs associated with terminating the call. Until further reform, providers would not recover any of these costs from originating callers.[55] Likewise, a number of commenters claim that, if forbearance were granted, some LECs might "not process" 8YY calls, and therefore consumers would be harmed.[56] Such blocking would appear to be a violation of the LECs' common carrier duties,[57] and, in any event, a carrier that refused to complete 8YY calls originated by its customers would very likely suffer competitive harm in the marketplace in the form of lost customers. Forbearance will thus not harm consumers.

### C. Forbearing From The Application Of Rules Allowing LECs To Tariff Charges Billed To IXCs For Toll-Free Database Queries Would Further The Public Interest.

Forbearance is in the public interest because it fosters a "market-based approach to 8YY query charges" and thus would "'reduce arbitrage and competitive distortions inherent in the current system, eliminating carriers' ability to shift network costs to competitors and their

[54] O1 Opp. at 22.

[55] *Transformation Order* ¶ 781 ("A bill-and-keep framework resolves whether a carrier will recover its costs from its end users or from other carriers; the underlying service whose costs are being recovered is the same, however, so no costs are being improperly shifted between competitive and non-competitive services").

[56] Consolidated/West Mot. at 36; Carrier Coalition Mot. at 33 (same).

[57] *Transformation Order* ¶ 839 (explaining that "[S]ection 201 of the Act also generally restricts carriers from blocking traffic").

customers."[58] Adopting a market-based approach through forbearance also would promote the public interest because, currently, the "carriers who pay these charges (IXCs) do not make the decision regarding which provider performs the database query," thereby creating "arbitrage issues within the industry," and resulting in "uneconomic hiring decisions and relationships."[59] Forbearance thus offers "[a] market-based approach to 8YY query charges" that would combat and "discourage the associated arbitrage opportunities these implicit subsidies are generating."[60]

A number of commenters suggest that forbearance should be denied because "AT&T operates ILEC and CLEC businesses," and its "CLEC query rates are higher" than rates of CLECs in a number of geographic markets.[61] To begin with, these claims are factually misleading.[62] In any event, these arguments provide no basis for denying forbearance. Indeed, the forbearance sought by AT&T would apply uniformly to all carriers, including when AT&T's affiliates operate as ILECs or CLECs. Consequently, AT&T's proposal would promote the

[58] Verizon Comments at 7 (quoting *Transformation Order* ¶ 738); *cf. MCI WorldCom v. FCC*, 209 F.3d 760, 766 (D.C. Cir. 2000) (the Commission was "entitled to value the free market, the benefits of which are well-established").

[59] CenturyLink Comments at 6.

[60] Verizon Comments at 7 (quoting *Transformation Order* ¶ 738). Under Section 10(b), the Commission "shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest." 47 U.S.C. § 160(b).

[61] *See* Teliax Opp. at 5-7 ("AT&T is, in essence, making a 'do as I say, not as I do' argument"); *see also* O1 Opp. at 22 (arguing that AT&T's "CLEC affiliate's federal tariff includes dip rates nearly twice as high as the mean cited").

[62] AT&T's practice as a CLEC has been to mirror the tariffed rate of the ILEC with whom it competes in specific geographic areas. In one of the examples cited, concerning the rate tariffed by an AT&T CLEC in Las Vegas, the rate is equal to CenturyLink's tariff rate. In other areas of Nevada served by other ILECs, the tariff rate of AT&T's CLEC is lower. In short, AT&T is more than willing to abide by the same rules that apply to other carriers.

public interest consistent with the Commission's conclusion that intercarrier compensation should be transitioned to a bill-and-keep system.[63]

Finally, as an alternative, a number of commenters suggest that the Commission adopt a benchmark approach.[64] For example, CenturyLink argues that "since there is clearly no economic justification for CLECs imposing toll free database query charges that exceed the ILEC rate for the same service," the Commission should determine CLECs may not "impose charges for toll free database queries that exceed the ILEC rate for the same service."[65] Although such a proposal might have been an acceptable interim solution years ago, it has now been over five years since the Commission concluded that bill-and-keep is the appropriate end state for all intercarrier compensation.[66] As a result, it is important to continue the transition to a bill-and-keep methodology.

Further, forbearance would avoid practical problems that otherwise would arise with respect to 8YY database charges. In fact, in 2011, the Commission decided that one significant advantage of bill and keep is that "[e]xact identification of efficient termination charges would

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[63] *Transformation Order* ¶ 740.

[64] *See* Verizon Comments at 7 (suggesting that "a good first step would be to take immediate action to phase down or eliminate tariffed charges associated with 8YY traffic, including query charges," for example, by "subject[ing] them to the benchmark regime for CLEC access rates"); *see also* CenturyLink Comments at 8 (advocating "a defined historical average cap rate for all LECs for these charges"); Inteliquent/Bandwidth/Onvoy Comments at 4 (arguing that Commission "should forbear from tariffing for 8YY dip charges above current corresponding ILEC rate and require CLECs to negotiate contracts for higher rates"); Peerless Opp. at 16 (if the Commission "desires to address excessive charges for toll free database dips globally, then "the Commission should adopt a benchmarking regime to limit competitive LECs' toll free database charges to those charges assessed by the incumbent LEC in the same geographic area").

[65] CenturyLink Comments at 8; *see also* Verizon Comments at 7; Peerless Opp. at 16. As noted above, the rates tariffed by at least some ILECs seem to be out of line with those of other carriers. It would be inappropriate to rely on an ILEC tariff rate as a benchmark where an ILEC's rate is itself excessive.

[66] *Transformation Order* ¶ 740 (adopting "bill-and-keep methodology as the end state for all traffic").

be extremely complex, and considering the costs of metering, billing, and contract enforcement that come with a non-zero termination charge," "the benefits obtained from imposing even a very careful estimate of the efficient interconnection charge would be more than offset by the considerable costs of doing so."[67] Given the wide variations in query charges (as discussed above and in the Petition), selecting an appropriate benchmark would likely prove difficult. Consequently, the approach that better supports the public interest is to forbear from rules requiring the tariffing of such database charges entirely. Rather, such charges should be determined via negotiated agreements.

## V. THE PROCEDURAL OBJECTIONS TO FORBEARANCE LACK MERIT

### A. The Existence of The Ongoing Rulemaking Does Not Justify Denial of Forbearance Required by Congress.

A number of commenters ask the Commission to reject the Petition, regardless of whether the relief is required under the mandatory factors in Section 10(a), because the commenters argue that the Commission's ongoing rulemaking is a better mechanism to address some, or all, of the pressing regulatory issues set forth in AT&T's Petition.[68] As an initial matter, this argument simply ignores that the Commission's NPRM was issued over five years ago, and no further reforms have been implemented. If action had been taken in response to the

[67] *Transformation Order* ¶ 753.

[68] *See* O1 Opp. at 6 (arguing that "Commission should consider issues with context of the open rulemaking proceeding"); Carrier Coalition Mot. at 8 (arguing that "AT&T's attempt to commandeer issues already addressed in the CAF proceeding by seeking piecemeal reforms through a forbearance petition must therefore be rejected"); Consolidated/West Opp. at 6 (the "Petition improperly seeks to hijack significant remaining issues already being addressed in the Commission's ongoing CAF proceeding"); HD Tandem Opp. at 2 ("The Commission should not permit any party to abuse the forbearance procedures for the purpose of imposing a deadline on agency action or securing desired relief by default through agency action"); NTCA Comments at 4 (Commission should "reject the petition because it seeks relief that is already the subject of a pending rulemaking proceeding"); *cf.* WTA/ERTA Opp. at 2 (relief requested "requires a full-fledged rulemaking open to all interested parties").

NPRM, then AT&T's Petition might be unnecessary. The fact that no action has been taken and that the rulemaking remains pending is not a basis to deny AT&T's Petition, and invoking that fact is merely a transparent effort to maintain the *status quo* while avoiding the mandatory timetable set forth in the forbearance statute.

Further, these commenters' arguments for additional delay cannot be reconciled with the forbearance statute adopted by Congress, which mandates forbearance where, as here, the relevant statutory factors have been satisfied. By its terms, Section 10(a) imposes mandatory obligations: "[T]he Commission *shall forbear* from applying any regulation or provision of this chapter . . . if the Commission determines that" the three forbearance criteria in subsection (a) have been satisfied.[69] In turn, Section 10(c) imposes a mandatory time limit for the Commission's consideration of a petition so that such a petition "shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) within one year after the Commission receives it."[70] Nothing in the plain language of Section 10 authorizes the Commission to deny or delay resolution of a forbearance petition based on the availability of a separate pending rulemaking.

That conclusion likewise is compelled by governing case law. Indeed, the D.C. Circuit squarely has rejected the position, advanced by a number of commenters, that Section 10 authorizes the Commission to "deny a forbearance petition on the grounds that an alternative route for seeking regulatory relief [is] available."[71] In *AT&T v. FCC*, the court explained that

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[69] *See* 47 U.S.C. § 160(a) (emphasis added).

[70] *Id.* § 160(c) (explaining that Commission can extend the one-year period by 90 days if "an extension is necessary to meet the requirements of subsection (a)"); *see AT&T Inc. v. FCC*, 452 F.3d 830, 835 (D.C. Cir. 2006) ("Nothing in section 10(a)(3) allows the Commission to avoid ruling on the merits of a forbearance petition whenever it finds the statutory deadline inconvenient").

[71] *AT&T Corp. v. FCC*, 236 F.3d 729, 738 (D.C. Cir. 2001).

"Congress enacted [section 10] as a 'viable . . . means of seeking forbearance' from regulation, and the Commission 'has no authority to sweep it away' on grounds that it would prefer to determine the appropriate regulatory treatment of a telecommunications service through a different mechanism."[72] Put simply, the "availability of . . . an alternative route for seeking [forbearance]," such as a separate rulemaking, "does not diminish the Commission's responsibility to fully consider petitions under § 10."[73]

Moreover, it is clear that the commenters who oppose AT&T's forbearance petition are, in fact, playing a type of "administrative shell game," in an effort to delay resolution of the pressing issues presented by AT&T's Petition.[74] With minor exceptions, the commenters do not dispute that the issues identified by AT&T are real and need to be addressed. Indeed, a number of commenters concede that the problems are serious.[75] Further, not a single one of the objecting commenters identifies any recent filings that they have made with the Commission to address access charge reform in the pending rulemaking, which has been largely dormant for nearly five

[72] *Id.*

[73] *Id.*; *accord AT&T*, 452 F.3d at 835-36 (rejecting argument that forbearance petition failed "'public interest' requirement because section 10(c)'s deadline precludes 'fully considered analysis' of such petitions").

[74] *See AT&T Co. v. FCC*, 978 F.2d 727, 732 (D.C. Cir. 1992) (it is improper to respond to the merits of a complaint by claiming that the relief requested may be addressed in rulemaking). *See also AT&T*, 452 F.3d at 836 (under Section 10, the Commission's authority to decide "whether 'forbearance . . . is consistent with the public interest,'" does not give the Commission further authority "to decide whether *deciding* whether to forbear is in the public interest.").

[75] *See, e.g.*, CenturyLink Comments at 2 (noting that "LEC tandem and mileage transport charges related to access stimulation continues to be a problem"); Inteliquent/Bandwidth/Onvoy Comments at 2 (agreeing that AT&T "has shown that some carriers engage in billing excessive transport mileage to or from LECs engaged in access stimulation"); NCTA Comments at 2 ("NCTA generally agrees with AT&T's concern about the need for the Commission to finish its ICC reform efforts"); *cf.* Verizon Comments at 3 (agreeing with AT&T's concerns and noting that "traffic pumpers are stimulating hundreds of millions of minutes each month to Iowa and South Dakota").

years.[76] Rather, the commenters appear to be betting that the existing rulemaking, with its indeterminate timeline, is a preferable alternative when compared to the forbearance proceeding under Section 10, which has as its "very purpose" "forc[ing] the Commission to act within the statutory deadline."[77]

In sum, the commenters' argument that AT&T's Petition should be denied on the grounds that the Commission may address the same relief at issue in the Petition at some unspecified time through a separate rulemaking is foreclosed by the language and purpose of Section 10, and controlling case law holding that Section 10's mandatory requirements cannot be avoided by reliance on other statutory mechanisms that may provide some relief.

### B. Nor Can The Commission Avoid Ruling On AT&T's Petition Because Of The Availability Of Case-By-Case Adjudication In Section 208 Complaints Or Through Tariff Review Proceedings.

Other commenters contend, in a related vein, that AT&T's petition should be denied because the Commission can address problems with access charges and access stimulation through complaints filed under Section 208 of the Act or through the tariff review process.[78] To be sure, the Commission's existing rules grant the Commission authority to address individual

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[76] The commenters' silence on this point is telling. Back in 2011, the Commission made clear the need for additional reforms. *See*, *e.g.*, *Transformation Order* ¶ 817 ("We find that originating charges also should ultimately be subject to the bill-and-keep framework"); *id.* ¶ 1297 (explaining that Commission seeks "to reach the end state for all rate elements as soon as practicable"); *id.* ¶ 1298 (seeking "comment on that final transition for all originating access charges"); *id.* ¶ 1314 (seeking comment "on any rate elements or charges that require additional reform"). Yet, none of the commenters that opposes AT&T's Petition offers any concrete suggestions as to how, or when, to address the problems associated with the access charge issues presented in AT&T's Petition or the continued problems with access stimulation.

[77] *AT&T*, 452 F.3d at 835.

[78] *See* Peerless Opp. at 5 (arguing that "FCC's enforcement procedures address the issues raised by AT&T"); NTCA Comments at 9 (petition should be rejected because "the relief it seeks is already available through established tariff review processes"); *id.* at 10 ("AT&T may also avail itself of the Section 208 complaint process").

malfeasance by granting Section 208 complaints and rejecting unlawful tariffs.[79] As with the availability of alternative rulemaking, however, the availability of a Section 208 complaint process and tariff-review provisions cannot be permitted to "gut" the mandatory requirements of Section 10.[80]

Further, the Section 208 complaint and tariff review processes, though beneficial, do not address the core opportunities for abuse of the intercarrier compensation system resulting from the partial reform instituted by the Commission. Indeed, the Commission warned that its partial reform, coupled with delay in adopting "the proper transition and recovery mechanism for the remaining elements," "could perpetuate inefficiencies" and "maintain opportunities for arbitrage."[81] Because the rules for which AT&T seeks forbearance are the same rules that the Commission acknowledged could, absent timely reform, be used to "perpetuate inefficiencies" and "to maintain opportunities for arbitrage,"[82] neither the Section 208 complaint process nor the tariff review process is an effective alternative to AT&T's Petition.

To be clear, enforcement of the Commission's existing rules directly addressing access charge abuse (such as the requirement that CLECs engaged in access stimulation permit direct interconnection) is an important deterrent that is helpful in limiting inefficiencies and arbitrage opportunities by carriers. However, enforcement of those existing rules, whether through the

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[79] *See* 47 U.S.C. §§ 204, 208; *see also* 47 C.F.R. Part 61 (tariffs); *id.* §§ 1.720-1.736 (Complaint process); *id.* § 1.773 (Petitions for suspension or rejection of new tariff filings).

[80] *See AT&T*, 452 F.3d at 830 (holding that Section 10 cannot be interpreted to allow Commission to avoid ruling on a forbearance petition "whenever it finds the statutory deadline inconvenient"); *AT&T*, 236 F.3d at 738 ("[A]n alternative route for seeking [regulatory relief] does not diminish the Commission's responsibility to fully consider petitions under § 10").

[81] *Transformation Order* ¶ 1297; *id.* ¶ 817 ("Accordingly, we find that originating charges for all telecommunications traffic subject to our comprehensive intercarrier compensation framework should ultimately move to bill-and-keep"); *id.* ¶ 820 ("we agree with concerns raised by commenters that the continuation of transport charges in perpetuity would be problematic").

[82] *Id.*

complaint process or through tariff review procedures, does not address AT&T's showing that forbearance is necessary as to existing rules that the Commission has acknowledged allow access charge abuses to continue while those rules persist. Accordingly, the availability of such remedies is not a substitute for granting AT&T's Petition.

### C. There Is No "Standing" Barrier to the Requested Forbearance Relief.

Some commenters claim that "AT&T lacks standing," arguing that AT&T's long distance affiliates do not provide any of the access services at issue, and that the Petition can therefore be denied on this ground.[83] These arguments are meritless. As a factual matter, the Petition was filed by AT&T Services, Inc. on behalf of its affiliates, which include both incumbent LECs and competitive LECs that provide the tariffed services at issue. *See* Petition at 1 & n.1. AT&T Services, Inc. and its affiliates thus "represent[] a 'class of telecommunications carriers'" subject to the requirements at issue, which plainly permits AT&T Services, Inc. and its affiliates to seek the relief requested in the Petition.[84] Even if a single-purpose AT&T long distance carrier had filed this petition only on its own behalf, it would still be acting precisely as the statute anticipates: it would be "requesting that the Commission exercise [forbearance] with respect to that carrier" by eliminating regulatory mechanisms that harm that carrier. 47 U.S.C. § 160(c). Nothing in the statute suggests that a carrier can file such a petition only if it is the directly regulated party.[85] In any event, the Act requires that the Commission "shall forbear" where the

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[83] *See* JVCTC/NVC/GLCC Mot. at 1; WTA/ERTA Opp. at 3; Teliax Opp. at 4.

[84] *Pet. of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from Enforcement of Certain Legacy Telecommunications Regulations*, 28 FCC Rcd 2605, ¶ 2 (2013) ("*USTelecom Short Order*") (quoting 47 U.S.C. § 160(c) and rejecting argument that non-carrier trade association lacked standing to petition for forbearance).

[85] For good reason, therefore, the Commission has never imposed any "standing" requirement similar to what petitioners propose here. *See USTelecom Short Order* ¶¶ 2-3 & n.26 (citing several earlier proceedings in which the Commission granted petitions filed by industry associations or similar groups without resolving questions of standing).

forbearance criteria are satisfied, 47 U.S.C. § 160(a), even if the Commission must do so "on its own motion."[86]

### D. The Motions For Summary Denial Lack Merit, And AT&T Has Provided Sufficient Evidence In Support Of The Petition.

A few commenters also have moved for summary denial of the Petition, in whole or in part.[87] A motion for summary denial cannot be granted unless "it can be shown that, when viewed in the light most favorable to the petitioner, [the petition] cannot meet the statutory criteria for forbearance."[88] None of the motions for summary denial satisfies this standard; they must therefore be denied.

*First*, as explained *supra*, AT&T has provided more than sufficient data to justify forbearance. The Commission categorically concluded in 2011 that access stimulation was problematic and that it should be curtailed. The comments confirm that access-stimulation schemes have continued to flourish, despite the Commission's efforts to curtail them, and despite the Commission's agreement that "continuation of transport charges in perpetuity would be problematic."[89] Nor do commenters dispute that 8YY query rates vary dramatically, as shown by tariffs on file with the Commission. These facts, as well as the Commission's own findings in the *Transformation Order*, are sufficient to establish that each of the criteria set forth in Section 10(a) has been satisfied.

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[86] *USTelecom Short Order* ¶ 2 n.21. *See also U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 727 (D.C. Cir. 2016) (upholding order in which Commission determined that, "'[b]ecause the Commission is forbearing on its own motion, it is not governed by its procedural rules insofar as they apply, by their terms, to section 10(c) petitions for forbearance.'") (quoting *Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601, ¶ 438 (2015)).

[87] *See* Consolidated/West Mot. at 1; Carrier Coalition Mot. at 1; INS Mot. at 1; JVCTC/NVC/GLCC Mot. at 1.

[88] 47 C.F.R. § 1.56(a).

[89] *Transformation Order* ¶ 820.

*Second*, contrary to some commenters' arguments, AT&T's Petition is "complete as filed."[90] "The Commission has defined 'complete as filed' to mean that a petition must explicitly state the scope of the relief requested, address each prong of the statute as it applies to the rules or provisions from which the petitioner seeks relief, identify any other proceedings pending before the Commission where the petitioner speaks to the relevant issues, and comply with format requirements."[91] The Commission imposed these requirements, codified at Section 1.54 of its Rules, in order to "permit interested parties to file complete and thorough comments on a fully-articulated proposal," and "to permit the Commission to act swiftly and efficiently" in its disposition of those proposals.[92]

AT&T has met these requirements (and their purposes) in its Petition and in Appendix A, in which AT&T identified:

- the statutory provisions, rules, or requirements from which forbearance is sought, 47 C.F.R. § 1.54(a)(1),
- the "groups of carriers," "services," and "geographic . . . areas" that are subject to the requested forbearance**;** 47 C.F.R. § 1.54(a)(2)-(4), and
- "any proceeding pending before the Commission in which [AT&T] has requested, or otherwise taken a position regarding, relief that is identical to, or comparable to, the relief sought in the forbearance petition."[93]

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[90] *See* Omnitel Opp. at 8; O1 Opp. at 2-3.

[91] *USTelecom Short Order*, ¶ 1 n.17 (*citing In re Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance* 24 FCC Rcd. 9543, ¶ 16 (2009) ("*Forbearance Procedures Order*")); *see also* 47 C.F.R. § 1.54 (codifying rule).

[92] *Forbearance Procedures Order* ¶ 12.

[93] 47 C.F.R. § 1.54(c). James Valley, Northern Valley, and GLCC's argument to the contrary (Mot. at 10-12) is absurd. The only proceeding in which AT&T has sought relief comparable to the requested forbearance was in WC Docket No. 10-90, *et al.*, a proceeding that AT&T plainly identified in Appendix A. Tellingly, these carriers do not attempt to explain how AT&T's disputes with *two particular* access-stimulating LECs could result in relief that would be comparable to the Commission forbearing from its tariff rules as to *all* LECs' tandem switching and tandem-switched transport services on *all* access-stimulation traffic, nationwide.

Omnitel and JVTC/NVC/GLCC argue that AT&T has not sufficiently detailed the scope of its forbearance request.[94] To the contrary, and consistent with the Commission's purpose in adopting the requirements in Section 1.54, a petitioner may satisfy those requirements as to a particular request for forbearance where the relief it seeks "is clear from the context of its Petition."[95] And a petitioner may seek forbearance from entire categories of rules and requirements where, as here, "[a petitioner's] arguments and evidence apply to the entire category."[96]

For these reasons, AT&T's Petition was complete when it was filed, and the motions for summary denial of the Petition are themselves flawed and should be denied.

### E. If Forbearance Is Granted, LECs Should Not Be Empowered To Seek Compensation Under State Law.

There is also no merit to the request of Consolidated Communications and West Telecom that the Commission condition its grant of forbearance on a supposed "clarification" that LECs may force IXCs to pay for their services "under alternate state law theories . . . in the absence of

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[94] *See* Omnitel Opp. at 5-8; JVCTC/NVC/GLCC Mot. at 5-7.

[95] *In re Pet. of USTelecom for Forbearance Pursuant to 47 U.S.C. 160(c) from Enf't of Obsolete ILEC Legacy Regulations That Inhibit Deployment of Next-Generation Networks*, 31 FCC Rcd. 6157, ¶ 55 n.171 (2015) (explaining that petitioner satisfied Section 1.54(a)(1) despite citing incorrect rule, in part because comments to petition demonstrated that opponents understood scope of forbearance request).

[96] *In re Pet. of USTelecom for Forbearance Under 47 U.S.C. 160(c) from Enf't of Certain Legacy Telecomms. Regulations*, 28 FCC Rcd. 7627, ¶ 10 (2013). There is no merit to Omnitel's claim that "[f]orbearance from Section 203 cannot be granted a second time to achieve a different result [from that achieved in the *Hyperion* order]." *See* Opp. at 6. In the *Seventh Report and Order*, the Commission mandatorily detariffed rates above its benchmark *after* it had previously adopted a permissive tariffing regime through forbearance in the *Hyperion* order, that is, the Commission "granted [forbearance] a second time to achieve a different result." *See Seventh Report and Order* ¶ 12 (discussing permissive detariffing); *id.* ¶¶ 82-87 & n.160.

a negotiated agreement" at the LECs' "formerly tariffed rates."[97]

The Commission should deny this request for two reasons. *First*, the requested condition is flatly inconsistent with the Commission's overall approach to reforming intercarrier compensation. Exercising its exclusive jurisdiction over the interstate services at issue,[98] the Commission has established a "uniform national bill-and-keep framework as the ultimate end state for all telecommunications traffic exchanged with a LEC,"[99] within which the states have no authority that is relevant here.[100] The courts have since upheld the Commission's uniform national framework.[101]

*Second*, by asking the Commission to allow LECs to rely on state law to force IXCs to pay for LEC services at pre-forbearance tariff rates, the commenters seek a condition that is tantamount to a request to continue to permit tariff accessed charges. Granting this requested condition would not only defeat the purpose of granting forbearance, it would frustrate the intent of Congress. When Congress enacted Section 10, it prohibited states from continuing to apply requirements that the Commission has decided to forbear from applying. *See* 47 C.F.R. § 160(e)

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[97] Consolidated/West Mot. at 39-40 (internal quotation marks omitted). To the extent that the Carrier Coalition makes the same request, Mot. at 24 n.10, it should be denied. Consolidated/West also ask that the Commission "condition" the grant of forbearance on a holding that carriers may file claims under Sections 201 or 202 if they fail to pay access charges. Mot. at 39. As explained above, in light of the Commission's longstanding and clear precedent that it lacks jurisdiction over such claims, and that such claims do not state a claim under the Communications Act, this request also is entirely meritless.

[98] *See, e.g.*, Br. of FCC & Dep't of Justice, *MCIMetro Access Transmission Servs. of Va., Inc. v. Christie*, No. 07-1401, at 12, 14 (4th Cir. Feb. 19, 2008) (explaining that a state commission order was invalid in light of the Commission's "exclusive jurisdiction over interstate communications services").

[99] *Transformation Order* ¶ 34.

[100] The areas in which the Commission has specified that states may act are not relevant here. *See id.* ¶¶ 803, 813.

[101] *In re FCC 11-161*, 753 F.3d 1015, 1125 (10th Cir. 2014), *cert. denied, Nat'l Ass'n of Regulatory Comm'rs v. FCC*, 135 S. Ct. 2072 (2015).

("A State commission may not continue to apply or enforce any provision of this chapter that the Commission has determined to forbear from applying under subsection (a)."). It is of no moment that Consolidated and West Telecom ask that the Commission empower courts applying state common law, rather than state commissions, to reimpose tariff access charges.[102]

[102] *See* H.R. CONF. REP. NO. 104-458, at 185 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 198 ("[S]ubsection (e) provides that *a State* may not continue to apply or enforce any provision of the Communications Act that the Commission has determined to forbear from applying.") (emphasis added); *In re Lifeline & Link Up Reform & Modernization*, 31 FCC Rcd. 3962, ¶ 335 n.844 (2016) ("*[S]tates are precluded* from applying the forborne-from provisions.") (emphasis added); *cf. Haw. Tel. Co. v. Pub. Util. Comm'n of Hawaii*, 827 F.2d 1264, 1278 (9th Cir. 1987) (a state cannot "accomplish by subterfuge what it could not . . . do directly").

## CONCLUSION

For the foregoing reasons and the reasons stated in AT&T's Petition, the Commission should forbear from applying the rules identified in AT&T's Petition and Appendix A to the Petition.

Respectfully submitted,

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